"Lang, Annette" <ALang@ENRD.USDOJ.GOV>
08/29/01 09:49 AM

To: Craig Melodia/R5/USEPA/US@EPA
cc:
Subject: FW: Skinner

see below from Karl.

-----Original Message-----
From: Karl Bourdeau [mailto:kbourdeau@bdlaw.com]
Sent: Wednesday, August 29, 2001 10:43 AM
To: Lang, Annette
Subject: Skinner

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JOINT DEFENSE PRIVILEGE

Annette:

Thank you for your August 27 e-mail setting forth the views of the United States on the litigation activities and tasks with which the U.S. and the Skinner Work Group may be confronted in litigation against the nonsettlors in this matter. The Negotiating Committee for the Work Group has carefully evaluated your comments and looks forward to discussing them with you on our call this afternoon.

We also wanted to provide you our perspective on this litigation. As a general matter, we believe your e-mail covers most of the tasks that the U.S. and the Work Group might conceivably need to undertake. At the same time, it is our view that we may be able to structure the litigation in a way that avoids * or at least defers * many of these items and related costs, and promotes settlement in the case at any earlier stage. In addition, you have referenced issues that the defendants may pursue and the U.S. may need to respond to that, in our judgment, defendants may conclude are not worth pursuing. For example, defendants would have a virtually impossible task of convincing Judge Weber, who has already entered a consent decree approving EPA's remedy, that that remedy is inconsistent with the NCP and that the United States should not be entitled to full recovery of its costs from liable parties.

In any event, we think the most productive way to proceed with our discussion tomorrow would be to discuss precisely how we would propose to the Court that this litigation be managed. Although we have not yet run this proposal by the members of the Work Group, I wanted to offer you the following suggestions for how we might proceed, together with a possible division of labor (by setting forth for each task whether the U.S. or the Work Group would take the lead, with input from the other):

* Submit a proposed case management order ("CMO") to Judge Weber in advance of the October 31, 2001 status conference that would recommend the following (Work Group lead):

- consolidation of the contribution and U.S. cost recovery cases
- realignment of those members of the Work Group who choose to proceed with this litigation as plaintiffs in the contribution action

- trifurcation of the case into the following three phases for purposes of both discovery and trial:

(i) liability of the nonsettling defendants under CERCLA (including whether they are jointly and severally liable);

(ii) damages owed to the United States; and
(iii) contribution claims of the private plaintiffs.

Our thinking on the trifurcation proposal is as follows. First, we believe the proposal is consistent with the manner in which the U.S. typically tries these cases. Second, we believe Judge Weber would be sympathetic to an argument that the principal reason these claims have not settled is that the defendants do not believe that they are liable. Consequently, discovery and, if necessary, trial should proceed on this issue alone first. Third, although the first two phases could be combined into one, we suggest bifurcating them because (i) it would leave the U.S. and the Work Group with less to focus on earlier in the case, and (ii) if we could obtain a joint and several liability finding in the first phase, or even merely a general finding of CERCLA liability, it would place considerable pressure on the defendants to settle, thereby conserving litigation costs (as you know, the courts have generally held that they have the discretion to address the joint and several liability finding in the liability phase of a bifurcated proceeding). Fourth, deferring the contribution claims to a third phase would streamline the case for the government and, we believe, reduce litigation costs for the Work Group by positioning us to reach a settlement with the defendants before that potentially protracted phase of the litigation becomes necessary. Our thought is that if we can jointly and relatively "quickly" obtain a joint and several liability finding, the U.S. should be in a position to extract a settlement from the defendants that would provide acceptable recoveries for both the U.S. and the Work Group without the need for further litigation.

* The CMO would also provide, among other things, for the following:

- the defendants would be required to turn their ADR submissions over to the government * under the protection of a confidentiality order * as part of their mandatory Rule 26 disclosures or otherwise (the S.D. Ohio recently adopted the Rule 26 procedures) (despite Local Rule 16.3(c), we would argue to Judge Weber that every party that has settled has provided their ADR submissions to the U.S., that the Work Group is already familiar with and possesses defendants' submissions in any event, and that their release to the U.S. should facilitate discovery, reduce litigation costs, and promote settlement);

- submission of RFAs within a date certain (the Work Group would take the lead on RFAs based on our greater familiarity with the facts);

- exchanges of interrogatories and document production within a date certain (the U.S. would take the lead on these in light of the standard CERCLA interrogatories/document production requests the government already has; if necessary, the Work Group would assist in tailoring those based on the ADR submissions);

- based on the responses to RFAs and interrogatories, the parties would either agree upon * or submit proposals to the court for * a schedule for summary judgment motions and/or depositions (although we agree that at least some depositions will most likely prove necessary, we are hopeful that we may be able, based on the defendants' responses to RFAs and interrogatories, to bring a summary judgment motion on liability in advance of any depositions; the only meaningful issue should be whether the defendants' construction debris contained hazardous substances, an issue we may be able to resolve solely on the basis of existing case law, an expert's affidavit, and RFA responses) (the U.S. would probably take the lead on the summary judgment motion given the stock CERCLA motion it has and uses; the Work Group would take the lead in identifying and working with the expert (although we would like the U.S. to pay the expert's fees since you can recover those costs); as for depositions, we would expect that we would either split those in some logical way or, if the U.S. feels strongly about taking them all, have the U.S. alone take them to avoid duplication of efforts).

* We would seek to defer scheduling of later phases of this litigation if Judge Weber will permit us to do so.

* Other relevant matters include, but are not limited to, the following:

- Based on the results of prior interviews and ADR questioning, it will be important for us to identify the Skinner site witnesses we wish to employ for each defendant, and re-interview them to either ensure that we want to take their deposition or to "prepare" them for depositions that will be taken by defendants (given our prior work with these individuals, the Work Group would take the lead on this effort).

- Among those you listed, we believe that the legal issues we are most likely to have to brief are (i) the statute of limitations for Marty Clarke (the U.S. would take the lead, as you have already indicated, due to its overarching programmatic interests regarding this issue); (ii) the "construction debris contains hazardous substances" (e.g., the Clarkes and Whitton)/"potassium permanganate is a hazardous substance and its initial presence at the site in Aeronca wastes is sufficient to support a liability finding even if it wasn't found at the site" (Aeronca) issues (the Work Group would take the lead on these issues, which in Aeronca's case might involve an Alcan defense); and (iii) successor corporation/personal liability issues regarding the Clarkes (if the U.S. does not wish to take the lead on both of these in light of programmatic considerations, the Work Group might address the former and the U.S. the latter).

- We expect, as you do, to name Dick Clarke individually as a defendant. We also believe that a legitimate issue exists as to whether Marty Clarke should be named as an individual (which has the advantage of putting his personal resources at risk). We intend to examine that issue and share our analysis with you.

- We agree that the size and availability of the financial resources of the Clarkes is a major issue in evaluating how to proceed with this case. Although we understand that one or both of the Clarkes have forwarded you "ability to pay" information, we are not aware of how extensive that information is or whether the U.S. has pursued similar such information through other avenues. If it has not done so, we strongly urge the U.S. to promptly send a CERCLA, § 104(e) request to both of the Clarkes asking for all relevant information on their corporate, partnership, and personal financial resources. Among other things, this request should ask for all insurance agreements which may satisfy all or part of a judgment against them. Although such a request is particularly appropriate for Dick Clarke (whom the government has not yet sued but whom the U.S. has concluded is a legitimate defendant), we believe it is equally appropriate for Marty Clarke and his relevant entities. If you disagree on the merits of such a Section 104(e) request at this time, please let us know, as we would like to discuss this with you.

Although there are clearly other issues that will need to be addressed for purposes of this litigation, the ones we have set forth above, in our opinion, warrant our immediate attention. In addition, although the negotiation of the "settlement split" between the Work Group and the U.S. is dependent, in some measure, on the ultimate split of litigation work between the Work Group and the U.S., we will be prepared to discuss on the call some further thoughts we now have on that issue.

I wish to reiterate that the views expressed above are solely those of our Negotiating Committee, and do not reflect the input or approval of the Work Group members.

We look forward to speaking with you this afternoon.

Karl S. Bourdeau
On behalf of the Skinner Work Group
Negotiating Committee

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